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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

v.

HARRIS N. MURABAYASHI, *et al.*,

Respondents.

REPLY MEMORANDUM

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REPLY MEMORANDUM

The Ninth Circuit deprived petitioner Honolulu Federal Savings and Loan Association ("HonFed") of any opportunity that it may have had to succeed in this litigation by resolving against it an issue that neither the parties nor the district court had ever previously addressed.

Respondents' complaint challenged a 1 percent interest rate increase by petitioner in 1981. The district court held that provisions of the promissory notes authorizing 1.5 percent interest rate increases on three months notice were "clear and unambiguous" and upheld the increase. In a 1984 decision, the court of appeals reversed because the mortgages securing the notes contained slightly different terminology and "the parties should be allowed to present extrinsic evidence to establish the terms" of the loan instruments construed together. Pet. App. C at 19a. After discovery and the presentation of evidence, the district court granted HonFed's summary judgment motion. It found the evidence "overwhelming" and upheld "the propriety of [HonFed's] 1981 [1 percent] escalation" of respondents' interest rates. *Id.* at 20a

On respondents' second appeal, the court of appeals shifted focus from the 1 percent increase in dispute to the maximum increase the loan instruments might permit. Reasoning that the "face of the note . . . permits an escalation . . . of 6 percent per year over the interest rate in existence the previous year," the court determined that the interest rate must somehow have been "held in check by the terms of the mortgage." Pet. App. D at 28a-29a. Since petitioner had failed to prove that "the meaning of the mortgage, con-

strued against it, did not control the note," and that 6 percent per year interest rate increases were justified, the court of appeals, in essence, directed judgment for respondents. *Id.* at 28a.

Thus the court of appeals transformed the case from one involving the permissibility of a 1 percent increase in 1981 to a new issue of whether HonFed could prove that it was entitled to raise interest rates 6 percent per annum. Without being given any opportunity to respond to the burden placed upon it by the court of appeals, HonFed is now faced with an adverse judgment even though it never had reason to address the issue now deemed decisive in this case.

The harsh lesson of the Ninth Circuit's decision is thus that a successful summary judgment movant may not only experience an erroneous reversal on appeal,[1] but also have its victory replaced with defeat without any opportunity to remedy or even respond to a previously unidentified defect in its case. As HonFed's certiorari petition demonstrates, that lesson is flatly contrary to this Court's holding in *Fountain* v. *Filson*, 336 U.S. 681 (1949), and seriously undermines summary judgment principles recently re-endorsed by this Court in *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986).

Respondents attempt to discount the significance of this case without refuting the profoundly negative implications of the court of appeals' ruling on sound summary judgment practice. They also attempt to dis-

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[1] As noted in the certiorari petition (note 8), while HonFed has not sought review of that part of the court of appeals' decision reversing summary judgment in its favor, it has not conceded the correctness on that ruling.

tinguish the *Fountain* v. *Filson* rule without overcoming the plain fact that the "6 percent issue" that is the basis for the judgment in their favor was framed first in the court of appeals' 1988 opinion, or that the issue had not been expressly addressed by the parties at any prior stage of the case.

A. The Ninth Circuit's Decision Warrants Review Because It Undermines The Efficacy Of Summary Judgment Practice

Respondents argue that, even if the Ninth Circuit's decision violated the rule of *Fountain* v. *Filson*, further review is unwarranted because the case is of no importance '"save to the litigants themselves.'" Respondents' Brief in Opposition ("Res. Opp.") at 9. While the underlying dispute regarding the interest rates on respondents' loans may well be of importance only to the parties, a larger principle is at stake.

Federal court litigants may be justifiably reluctant to move for summary judgment if the price of success in the district court carries with it the prospect that a federal court of appeals may not only reverse the favorable result but also, as here, direct the entry of judgment for the opposing party on the basis of a new legal theory without affording the movant the opportunity to develop its case on remand so that it can meet the defect identified by the appellate court.[2]

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[2] Respondents contend that HonFed has overstated the adverse consequences because "[a]n inherent risk in moving for summary judgment is that the court will agree that there is indeed no genuine issue of material fact but that the facts established dictate judgment for the other party." (Res. Opp. at 11-12). But even assuming that an appellate court has the authority to enter summary judgment in appropriate situations,

The predictable result will be that cases that should be resolved by summary judgment will instead proceed to trial, thereby further burdening the federal judicial system, and unnecessarily consuming the resources of the parties as well. *See Celotex Corp.* v. *Catrett*, 477 U.S. at 327.

This case is an apt vehicle for reinvigorating the *Fountain* v. *Filson* rule—an area that the Court has not expressly addressed in forty years—and thereby underscoring for the various federal courts of appeals the need for scrupulous adherence to fundamental summary judgment principles.

B. HonFed Was Deprived Of The Opportunity To Remedy The Defect In Its Case Identified By The Ninth Circuit

Recognizing that the Ninth Circuit was not free to grant summary judgment in their favor if doing so

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the use of that power to deprive a litigant of the right to meet the case against it would have precisely the consequences described by HonFed. Consequently, absent the clearest case, the "appellate court should not order summary judgment for the non-moving party, but should remand for further development of the case, which may include the making of a motion for summary judgment by the prior non-moving party who prevailed on the appeal." 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.12 at 169 (2d ed. 1988). The cases respondents cite hold nothing more. *See Potenze* v. *New York Shipping Ass'n., Inc.*, 804 F.2d 235 (2d Cir. 1986) (summary judgment by appellate court only appropriate when party against whom judgment is to be entered has had full and fair opportunity to litigate question and no new facts would be developed on remand), *cert. denied*, 481 U.S. 1029 (1987); *Viger* v. *Commercial Ins. Co. of Newark, N.J.*, 707 F.2d 769, 774 (3d Cir. 1983) (no genuine facts in dispute as to issue decided on appeal); *Cool Fuel, Inc.* v. *Connett*, 685 F.2d 309, 312 (9th Cir. 1982) (summary judgment by appellate court allowed only when adverse party had full and fair opportunity to "ventilate" the issues involved).

unfairly deprived HonFed of the opportunity to meet its "burden," respondents try to distinguish *Fountain* v. *Filson* on its facts. According to respondents, "[t]he situation here bears no resemblance to that . . . in *Fountain* . . ." because there was "simply no 'new issue,' legal or factual, on the second appeal as to which HonFed had not had an opportunity to litigate . . . ." (Res. Opp. at 10-11). The record of the proceedings below, including respondents' arguments at both the trial and appellate court levels, however, unquestionably shows that the 6 percent issue surfaced first in the Ninth Circuit's 1988 opinion, and that the court of appeals erroneously denied HonFed the opportunity to meet that newly announced standard.

First, contrary to what they intimate (Res. Opp. at 10-11), the fact that respondents had always maintained that the loan documents limited interest rate increases to a maximum of 1.5 percent did not in the factual context in which the case arose give HonFed any reason to believe that in order to prevail it had to prove a right to raise rates by 6 percent each year. The loans in question were made in 1964. In 1974, HonFed raised interest rates by 1.5 percent, and in 1981 by 1 percent. Respondents' action challenged the 1981 rate increase. To defeat respondents' claim and validate the 1981 increase—what the respondents now agree was the "core issue" in this case (Res. Opp. at 5, 11)—HonFed merely had to demonstrate a right under the loan documents to raise interest rates by an additional 1 percent over what respondents maintained was the maximum allowable rate increase. HonFed did so to the complete satisfaction of the district court, which found the evidence

in this regard "so overwhelming that were the case to go to trial, the Court would grant a motion for directed verdict . . . ."[3] Pet. App. C at 24a. Whether HonFed had the authority to raise rates by any greater amount was and is a wholly academic question. Yet, the court of appeals elevated that to the central critical issue in the case.

Second, the Ninth Circuit's 1984 decision on respondents' initial appeal did not frame the 6 percent issue. In that opinion, the court held only that it was unpersuaded that HonFed could raise interest rates by more than a maximum of 1.5 percent over the life of the loan because the loan documents, taken together, were susceptible to more than one meaning. Nowhere in that opinion is there the slightest indication that those instruments were not susceptible to a construction that interest rates could be increased by 1.5 percent each year, or that HonFed could not meet its burden of resolving the perceived ambiguity in the loan documents by extrinsic evidence of a right to raise rates by that amount. The court of appeals remanded the case to the district court to allow the parties to present extrinsic evidence establishing the terms of the loan agreement without any indication of what evidence would or would not suffice.

Perhaps the most persuasive evidence that the 6 percent issue was not identified by the 1984 appellate decision as HonFed's burden are the subsequent proceedings on remand. Plainly, the district court did

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[3] The court of appeals never explicitly expressed any disagreement with the district court's assessment of the evidence supporting HonFed's right to raise interest rates by 1.5 percent each year.

not understand that to be HonFed's burden as manifested by the fact it granted summary judgment to HonFed on the basis of extrinsic evidence that HonFed could increase interest rates by 1.5 percent each year over the life of the loans. And contrary to what they now suggest (Res. Opp. at 5, 11-12), respondents did not oppose HonFed's summary judgment motion on the ground that HonFed had fallen short of showing a right to raise interest rates by 6 percent. Rather, respondents opposed HonFed's motion because material facts were allegedly in dispute. According to respondents' summary judgment opposition, "there is ample extrinsic evidence—evidence as to the surrounding circumstances—evidence of what was said, what was done when the documents were executed—that must go to the jury that ultimately will decide the true and proper meaning to be given to the language used."[4] Certainly, had the Ninth Circuit's 1984 decision even arguably put the burden on HonFed to establish a right to raise rates by 6 percent annually, respondents would have made that argument forcefully in the district court. That respondents did not shows powerfully that the 6 percent issue was not identified by the Ninth Circuit until announced in the 1988 decision under review. *See Ithaca College* v. *N.L.R.B.*, 623 F.2d 224, 229 (2d Cir.) (court of appeals should not direct judgment when dispositive issue identified on appeal not addressed below), *cert. denied*, 449 U.S. 975 (1980).

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[4] Plaintiffs' Memorandum In Opposition To Motion For Summary Judgment, dated July 14, 1986, at 3. Indeed, respondents' summary judgment opposition concluded with the request that "the matter [should be] set for trial." *Id.* at 11.

Third, while respondents did argue on the second appeal that the "ambiguous" loan documents should be construed in their favor, the context in which that argument was made shows that respondents' sole point was that HonFed's evidence that it could raise interest rates by 1.5 percent each year was insufficiently certain to resolve the purported ambiguity in the loan documents, not that HonFed failed to show that it could raise rates in greater amounts and more often than it did.[5] Indeed, nowhere in their appellate briefs did respondents argue that judgment should be entered in their favor because HonFed failed to meet its "burden" of establishing a right to raise rates by 6 percent.[6]

Finally, respondents argue repeatedly that no purpose would be served by again remanding the case for HonFed has failed to describe the evidence that it would then present to the district court. (Res. Opp. at 11). There is no reason that HonFed need at this

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[5] *See* Appellants' Reply Brief at 4-6, dated November 27, 1987.

[6] In fact, respondents' appellate brief states that "the matter cannot be said to be beyond doubt so as to preclude trial and permit Summary Judgment . . . ." Appellants' Opening Brief at 18, dated September 18, 1987. Respondents now contend, however, that even though they resisted summary judgment on the basis of disputed material facts, the court of appeals' award of summary judgment in their favor was nonetheless proper. (Res. Opp. at 13). Respondents do not explain—as they cannot—why the absence of a motion on their part should make summary judgment easier to obtain. As pointed out in HonFed's certiorari petition (at 20-23), any doubt as to the existence of a triable issue must be resolved against the moving party. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Thus, since respondents at all times maintained that a triable issue existed, summary judgment in their favor was patently erroneous.

stage describe in detail the evidence that it would submit on remand. As pointed out in its certiorari petition (at 19), however, had the 6 percent issue been fairly framed at an earlier stage in the case, HonFed would have adduced testimony and other evidence that the loan documents contemplated precisely what the notes stated: that after three years and upon three months written notice, it could raise rates then in effect by up to 1.5 percent. It would have explained that while this provision might have authorized increases up to 6 percent each year, competitive pressures would, in practice, have precluded any such increases. Evidence of other loan agreements might have been submitted to show how similar rate increase provisions were understood to operate. Also, while some HonFed officers and employees testified at depositions that they intended interest rate increases to be no more than 1.5 percent per year in practice, there was some testimony, and there could be additional testimony on remand that greater increases were possible. *See* HonFed's Memorandum In Support of Motion For Summary Judgement at 7-9 (July 2, 1986).

The crucial issue before this Court is not, however, whether HonFed will be successful on remand, but rather whether the court of appeals' ruling deprived HonFed of the opportunity to present evidence sufficient at least to raise a genuine factual issue, and then ultimately to persuade a jury that it could raise rates by considerably more than the amount of the 1 percent increase actually at issue in the case. No serious question exists but that the Ninth Circuit unfairly deprived HonFed of that opportunity.

CONCLUSION

That the Ninth Circuit ignored the holding in *Fountain* v. *Filson* in this case is beyond any doubt. The impact of the court of appeals' egregiously erroneous ruling on petitioner is so unduly harsh and its potential adverse affect on summary judgment practice so substantial that it must be set aside in the exercise of this Court's supervisory authority over the federal judiciary. As suggested in HonFed's certiorari petition, the Court might well choose to act summarily by granting certiorari and reversing the decision below, as it did in *Fountain* v. *Filson*.

February 2, 1989

Respectfully submitted,

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